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Executive Registry
77-4297/2

OGC 77-3706
10 June 1977

OGC Has Reviewed

MEMORANDUM FOR: Deputy Director of Central Intelligence

STATINTL FROM: [redacted]
Associate General Counsel

SUBJECT: Use of Appropriated Funds for Physical Conditioning and Recreational Facilities

REFERENCE: Memo for DDCI, Via DDA, fm D/OP, dtd 9 May 77, Subj: Facilities for Physical Conditioning and Recreation

1. This is in response to your request for a review of the legality of spending appropriated funds for certain employee physical conditioning and recreational facilities. Referent memorandum suggests the following expenditures: $600 for walking and jogging trails; $15,100 for an electric gate, gravel road and 20-car parking lot; $50,000 for four tennis courts; $9,200 for a basketball court; $350 for a volleyball court; $5,500 for a handball court; and $7,550 for drinking fountains and trash containers.

2. Article I, Section 9, Clause 7 of the Constitution, which provides, in pertinent part, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made Law; . . .," imposes a limitation on the disbursing authority of the executive branch unless funds have been duly appropriated by an act of Congress. Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). By virtue of this provision, Congress has broad discretionary power to prescribe conditions and details attendant to expenditures of appropriated funds. Id at 322. The purposes of an appropriation, as well as the terms and conditions under which it is made, are matters solely for the Congress and neither the executive nor judicial branches are entitled to interfere or usurp this constitutional authority. Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985, 988; aff'd, 154 F.2d 419 (9th Cir. 1946); see also Hart's Case, 118 U.S. 62 (1886). Accordingly, no Federal officer, including the President, can legally expend funds without, or in a manner inconsistent with, a congressional appropriation. Reeside v. Walker, 52 U.S. 272, 291 (1850).

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3. The basic statute governing the use of appropriated funds is found at 31 U.S.C. 628 which provides:

> Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

The thrust of this provision is that inherent in the constitutionally based appropriation process is the understanding that when Congress appropriates funds to the various departments to carry out the functions and responsibilities assigned to each, it does so on the basis of an informed consent regarding the purpose or purposes for which the funds will be spent. Obviously, it is impossible for the Congress to be fully informed on every minor item of expenditure by each department of the Government and accordingly, certain rules of interpretation have grown up within the body of appropriations law, primarily as promulgated by the Comptroller General of the United States. Often he has been called upon to provide opinions on various and sundry expenditures sought to be made under generic, housekeeping or maintenance provisions of appropriations acts and in doing so has tried to find some logical nexus between the proposed expenditure and the purpose of the appropriation. In the absence of such a nexus, the proposed expenditure fails for want of legal authority.

4. The touchstone opinion of the Comptroller General in the area of using generally appropriated funds to provide recreational facilities for employees is found at 18 Comp. Gen. 147, 10 August 1938. In responding to the Secretary of War who wanted to use appropriated funds to provide recreational facilities for a Government workforce which was constructing a project on Midway Island, the Comptroller General held:

> While the furnishing of recreational facilities may be highly desirable, particularly in a place such as referred to in your letter, they constitute expenses which are personal to the employees and which are not permitted to be furnished from appropriated funds unless provided in the appropriation either specifically or by necessary implication... In the present case, while it appears that the proposed expenditures would provide recreational and entertainment facilities for the employees, there has been no showing made or even any allegations that such expenditures are really within the purview of the appropriation for rivers and harbors improvements proposed to be used

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> for the prosecution of the project in question, or that such expenditures are essential in or even reasonably incident to prosecuting the project. Therefore, the question submitted is answered in the negative.

Ten years later, he applied the same reasoning to a question on the availability of appropriated funds to pay the salaries of civilian employees who were to develop, organize and supervise recreational programs for civilian employees of the Navy Department:

> It may be stated as a general rule that the use of appropriated funds for objects not specifically set forth in the appropriation act but having a direct connection with and essential to carrying out the purposes for which the funds were appropriated is authorized. However, while recreational and entertainment programs for Federal employees doubtless may be desirable in certain instances, such as referred to in your letter, it would seem that, at most, they have an indirect bearing upon the purposes for which the appropriations were made. Hence, in the absence of a clear expression on the part of the Congress that appropriated funds be used in connection with recreational and entertainment activities for Federal employees, this Office would not be warranted in authorizing such use, notwithstanding the administrative determination of desirability of the matter. Accordingly, your question is answered in the negative. 27 Comp. Gen. 679 (12 May 1948)

This rigid position of the Comptroller General has continued and has been relaxed in only a few instances. Via an unpublished opinion, B-86148, 8 November 1950, he turned down use of appropriated funds for incentive background music at three Navy installations. In another, B-126374, 14 February 1956, citing 18 Comp. Gen. 147, he denied reimbursement to a Department of State officer who had spent $53.50 to hire a boat and crew for a recreational trip on the Red Sea. A 23 May 1958 opinion, B-135817, directed a certifying officer not to certify a claim for $17.95 for a volleyball, net and horseshoes purchased by the Forest Service for off-duty use by its employees at a remote cite; the certifying officer believed a specific appropriation permitted the expenditure in question, and argued that unless the equipment was provided and the men encouraged to engage in "recreational activity of a wholesome nature," they would become restless

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and sluggish due to inactivity, and this, in turn, would detract from the effectiveness of the Forest Service training. Citing again 18 Comp. Gen. 147, the Comptroller General held that, "at most, the furnishing of such equipment has only an indirect bearing upon the purposes for which the appropriation was made."

5. An example of the required logical nexus suggested previously is found in an opinion where the Comptroller General held that a specific appropriation act, the Mexican-American Treaty Act of 1950 which authorized the construction of a number of items including "recreational facilities for the officers, agents, and employees of the United States," therefore included, by necessary implication, an authorization to purchase playground equipment for the children of said employees. He ruled further, however, that the people who used the recreational facilities should be charged because, in most circumstances, they would be expected to furnish such equipment or facilities at personal expense; he did not require a charge for use of playground equipment. 41 Comp. Gen. 264, 24 October 1961.

6. Those few opinions in which this rigid prohibitive position has been relaxed provide little significant support for the proposed expenditures set out in the first paragraph. In one, where a Federal Aviation Administration appropriation specifically provided for "the construction and furnishing of quarters and related accommodations" in an isolated sector of the Panama Canal Zone, the Comptroller General interpreted the appropriation "as including certain limited recreational facilities such as tennis courts and playground facilities." B-173009, 20 July 1971 [Emphasis added.]. The opinion contained a number of criteria which distinguish it from the general rule. First, there was a specific appropriation which lent itself to the desired interpretation -- the "related accommodations" emphasized above; second, there had been an administrative determination that the absence of recreational facilities adversely impacted on the ability of the FAA to perform its functions at the location; and third, the facts underlying the administrative determination appeared compelling -- the FAA housing sites were isolated and not close to any recreational facilities and the absence of some form of recreation had caused dependent teenagers to turn to narcotics and vandalism and this, in turn, hampered personnel recruitment. The Comptroller General did not believe, however, that "related accommodations" included the construction of a gymnasium.

7. Other departures from the position are as follows: Based on a determination of the Commissioner, Bureau of Public Debt, that "scientifically programed music" would improve employee morale, increase employee productivity and result in savings to the Government, the Comptroller General found that such

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music was a "necessary expense" and permitted payment of $61.00 per month to MUZAK, thus reversing B-86148 of 8 November 1950. 51 Comp. Gen. 797, 6 June 1972. He also permitted an expenditure of $400 for a television set as a "necessary expense" in carrying out the purposes of an EPA appropriation. The television set was to be installed on an EPA boat which plied the waters of the Great Lakes taking water samplings. The opinion noted that the EPA scientists on board were furnished lodging and meals and thus, compensated only $1.00 per diem and, that commercial lodgings would normally have included a television set. 54 Comp. Gen. 1075, 20 June 1970. As is evident, absent a specific appropriation providing for physical conditioning or recreational facilities or, a clear nexus between Agency functions and physical conditioning and recreating, expenditures for these purposes are generally held to be contrary to law.

9. The first OGC opinion (16 November 1951) on this question was written by Lawrence Houston and supported by a memorandum for the record on the applicable law. Referring to the 1938 Comptroller General opinion cited in paragraph 4, supra, Houston advised:

> ...The use of funds for this purpose has been denied in spite of the dearth of such facilities at the base, distance from the base to the closest public facilities, or the effect on the morale of employees in the absence of such facilities.
>
> In view of this restrictive interpretation, justification for this Agency to expend funds for this purpose must be based upon unique operations, which could take us out of the purview of the decisions.
>
> * * * *
>
> Fundamentally, the justification for such expenditures is a factual determination for your...[the then DDS]...consideration.

On the basis of this opinion determinations have apparently been made which permitted expenditures of appropriated funds for the physical fitness room and the limited equipment within it. According to a 5 August 1976 memorandum by the Office of Personnel, the physical fitness room was "established in order to provide for the conditioning of employees who have physically demanding official duties and those who are assigned to TDY standby status." That same memorandum asked that "our authority be reconfirmed to assign employees paid from appropriated funds to the EEA Coordinator function...and to the Physical Fitness Room." An OGC opinion dated 14 October 1976 in response to this request

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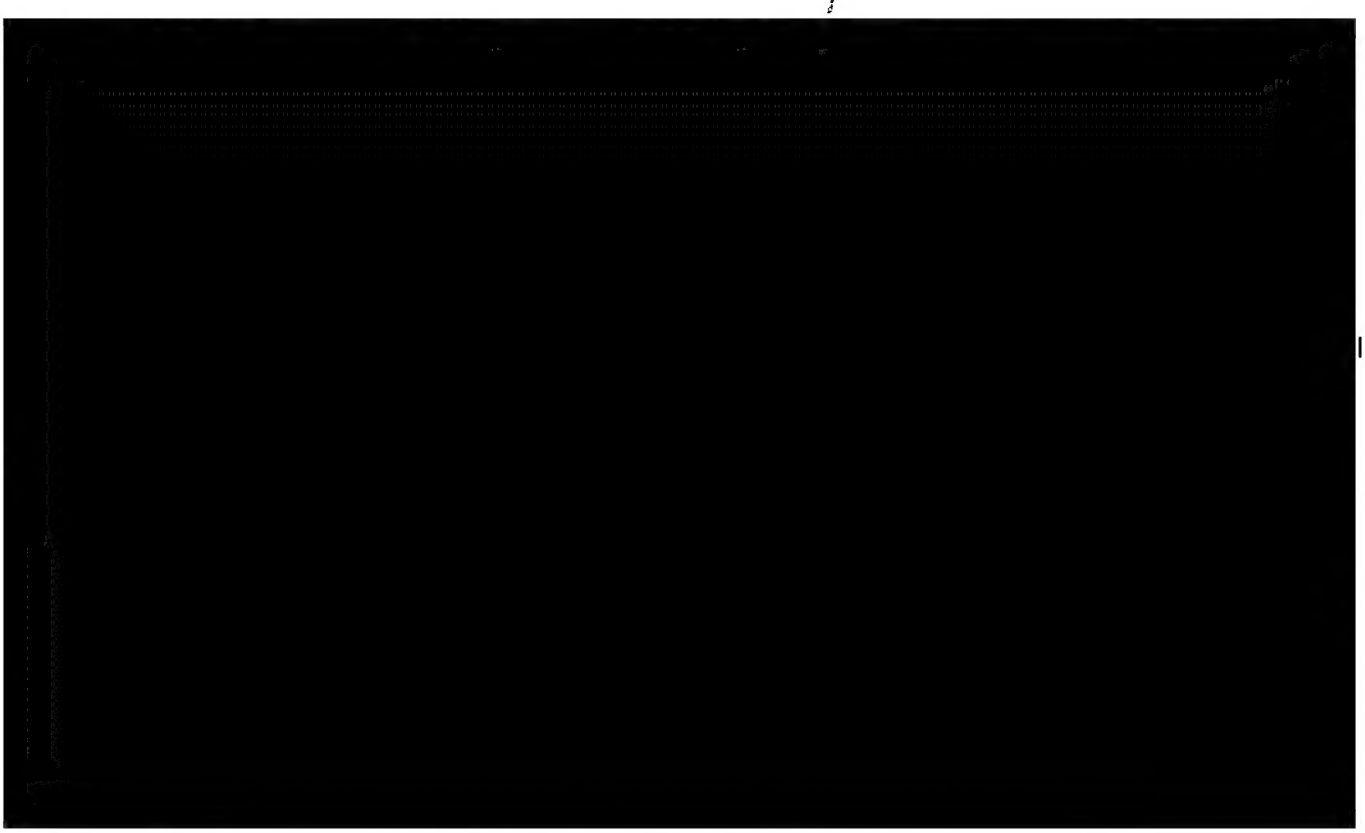
held that although appropriated funds could not be used for "purely recreational activities" physical fitness activities could be supported by the use of appropriated funds "where such expenditure is essential to the mission for which the funds were appropriated." It concluded that security and personnel requirements justified the continued use of appropriated funds for the EAA Coordinator Function and Physical Fitness Room. Upon reexamination it is our view that opinion stretched our spending authorities close to their outer limits, and it may even be that the opinion should be reconsidered, or at least bolstered by factual determinations which we understand were not made, tying the activities and expenditures in question to the Agency's mission. That is not to say the opinion is in error and indeed there are functional distinctions between a limited Physical Fitness Room and recreational facilities of the type proposed. FOIAb5



11. In summary, it is the opinion of this Office that arguments cannot fairly be made to justify the expenditure of appropriated funds for the purposes enumerated in referent memorandum. Two courses of action appear open to the Agency at this time. First, request of the Congress a specific authorization

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to expend funds for the proposed purposes or, in the alternative, for the existing limited facility. I am of the opinion that given the modest amounts which are proposed to be expended, conceivably a case could be made which would satisfy the Congress as to the "necessity" for such facilities. A second course open to the Agency is to view this opinion as advisory in nature and prepare an inquiry for review by the Comptroller General using as justification as many of those things which can fairly be said to be supportive of the proposition that the facilities in question are "necessary or essential" to the mission of the Agency. This Office would welcome the opportunity to draft the inquiry to the Comptroller General if you believe that is a proper course to follow and, I would suggest a preliminary informal approach before we commence drafting.

12. This has been a most difficult opinion. Clearly, there is a substantial benefit to be gained by making the proposed facilities available to Agency employees on the compound for use before, during and after work hours, but it is imperative, I believe, to steer the Agency in a course on this question which is legally correct. I am confident that most of the proposed facilities can eventually be constructed either via the appropriation process or the suggested Comptroller General opinion and, the same will have been effected without any possible charge of illegality or impropriety.

13. If I can be of any further assistance, please advise.

STATINT

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Recreational Facilities Study

1. At the request of the DDCI we have conducted a study of the recreational facilities used by other civilian agencies and the methods by which they acquired them. In the course of our study we visited Agriculture, FBI, Interior, NSA, State and NASA. This memorandum contains a report of our findings.

2. We did not find evidence in any of our discussions of civilian agencies or their employee associations actually providing recreational facilities solely for the relaxation and enjoyment of employees or association members. There were no officers clubs, golf courses, tennis courts or swimming pools operated by these organizations. In most cases provision is made for clubs and teams to be organized and arrangements made for the use of offices for meetings and local community athletic fields, gymnasiums, bowling alleys, etc. for sports activities. The nearest that anyone came to having their own recreational facilities were the extensive plans made at NSA in the early 1970's for a 3 1/2 million dollar building. They were unable to obtain necessary backing from DOD non-appropriated funds and a survey of NSA employees indicated that only 40 were willing to invest $500 in a share of the facility.

3. The lack of recreational facilities is a result of the legal obstacles involved. When this matter was explored by OP in 1959, OGC provided the following comments:

> "In general, the use of appropriated funds for employee organizations, unless expressly authorized in the Appropriation Act, is restricted by 31 USC 628 which provides: 'Except as otherwise provided by law, sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they were respectively made, and for no others.' In a series of decisions the Comptroller General, on the basis of 31 USC 628, has denied the expenditure of funds for the purchase or rental of recreational property or the payment of services relating to recreational supervision. The use of funds for those purposes has been denied in spite of the dearth of such facilities at the employee's base, or the effect on the morale of employees in the absence of such facilities."

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These obstacles have been partially overcome in the case of gymnasiums and/or physical fitness rooms which could be considered recreational facilities. Among the six organizations we surveyed only Agriculture did not have either a gymnasium or a physical fitness room. These facilities have generally been justified as being necessary for employees to maintain a level of physical fitness required to perform their official duties. Perhaps the most elaborate of these programs is the one of the FBI which provides a large gymnasium, supervised exercise and a variety of specialized equipment. During the planning of their new building they stressed the need to provide for the physical conditioning of their special agent personnel and they were able to justify the use of considerable space and funds for this purpose. Orginial plans also included an indoor swimming pool but it was later abandoned.

4. With the use of appropriated funds severly limited, most organizations have had to rely on employee associations to provide recreational opportunities and benefits for their employees. In order to develop non-appropriated funds for such activities the associations have engaged in a wide variety of enterprises. Attached is a copy of a 1974 GAO report on space allocations by Federal agencies to employee associations which details some of these activities. At that time there were about 200 employee associations in 32 agencies which reported over $34 million in annual gross revenues. These associations were viewed as an important means of enhancing the effectiveness of Federal employees. The thrust of the report was, however, that GSA should develop a uniform policy and guidelines since the use of Federal space and services without charge by revenue-producing associations could be regarded as not being in accordance with the intent of Title V of the Independent Offices Appropriation Act. As a result of the report GSA developed draft policies and procedures which required the payment of fair rental value for a majority of non-Federal activities. This caused considerable concern particularly with regard to cafeterias and the whole matter was eventually turned over to OMB. It is not known at this time whether OMB will issue a policy on this matter or what form it might take.

5. In addition to reimbursement for space, employee associations are being required to assume a majority of their personnel costs. The Audit Staff has questioned our assignment of four Staff employees to EAA related functions and OGC has the matter under consideration at this time. Our justification has been based upon security and cover considerations which necessitate careful guidance and control of these activities. We determined that NSA has already been required to change their Civilian Welfare Fund employees from appropriated to non-appropriated funds. The employee

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associations of all the organizations we surveyed either pay the salaries of their employees or rely on the volunteer services of Federal employees who perform part-time duties for the association "on their own time." If EAA is required to follow a similar course, there will have to be drastic changes made because the Association does not generate sufficient income to pay the current staff.

6. With increasing limitations being placed on the earning capacity of employee associations through space and personnel costs, it is highly unlikely that the record of the Kennedy Space Center will ever be equalled. The attached GAO report indicates that in the period 1965-1974 their association was able to invest about $500,000 from net profits in building a recreation complex of 50 acres. They were able to generate over $50,000 a year in net profits through vending machine and store sales at the Space Center. The principle source of income for our association is the EAA Store. In CY 1975 the Store had a profit of $16,151 and EAA's total net gain was $17,262. Since the EAA Budget for 1976 activities amounted to $17,421, we are essentially in a position at this time of breaking even. It appears likely that EAA will be hard pressed to maintain its current level of activitiy if it is required to assume the full burden of space and personnel costs. A substantial new source of income will therefore have to be developed if EAA is to undertake the funding of extensive recreational facilities.

7. It is possible that a limited improvement in existing recreational facilities could be financed from available non-appropriated fund assets. EAA now has about $65,000 that could be used for the benefit of its members, but as noted above, its reserve could quickly disappear if EAA is to bear all EAA personnel costs. The EAA Board has considered the possible uses of these funds but has deferred action pending final resolution of the space and personnel cost issues.

8. Based upon our survey and the information presented above, it is recommended that the following courses of action be considered:

a. Include provision for a gymnasium, physical fitness room, locker rooms and a swimming pool in plans for any future buildings to be constructed in the Headquarters complex.

b. Issue a questionaire to determine the interests of Agency employees in various recreational facilities.

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c. Ask the EAA Board to consider the results of the questionaire and the most effective and beneficial use of its available resources.

Atts

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